

CAUSATION, THE "WHO DONE IT" ISSUE, AND ARNO BECHT

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In commenting on Arno Becht's *Factual Causation*,¹ there is small chance that the world "will little note nor long remember" what is said here. The publication in 1961 of the book, coauthored with Professor Frank Miller, itself created only a brief stir among torts scholars and their attention span was short.² The larger legal world paid no heed at all. The same benign neglect will surely attend these comments. This is not to say that there is no merit in the major Becht-Miller thesis that there should be, as far as possible, a clean separation between questions of factual causation or connection and the question whether liability, as a matter of policy, should be imposed in the case. There is also merit in a related and not necessarily contrary proposition that the hard causation cases present policy issues.³ But merit and attention do not necessarily go hand in hand. The general lack of interest is chargeable, rather, to the relatively slight importance of the "who done it" issue in the real torts world.

In the usual personal injury claim situation the client has a very clear idea of who did him in. Certainly the lawyer has to identify the targeted defendant early in the game, and the issue of "who done it" is usually no issue at all. Everyone concerned knows that the defendant had a significant, substantial, highly noticeable, and culpable connection with what happened to the plaintiff. That is why the particular

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1. A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* (1961).

2. The author first reviewed A. BECHT & F. MILLER, *supra* note 1, in 1964. Pedrick, *Book Review*, 58 *Nw. U.L. REV.* 853 (1964). The opening paragraph referred to the fact that the Torts Roundtable of the Association of American Law Schools in 1963 was devoted to a discussion of the Becht and Miller book. *Id.* at 853. Since then, the book has been the subject of occasional references in writings on causation but without extended consideration or assessment.

3. See Calabresi, *Concerning Cause and the Law of Torts*, 43 *U. CHI. L. REV.* 69 (1975); Malone, *Ruminations on Cause in Fact*, 9 *STAN. L. REV.* 60 (1956); Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 *TEX. L. REV.* 423 (1968); Weinrib, *A Step Forward in Factual Causation*, 38 *MOD. L. REV.* 518 (1975).

defendant is sued. The defense of alibi does not often succeed in torts litigation. To have the question whether the defendant was the one who did it to the plaintiff become a disputed issue of fact is most uncommon. Pick up an advance sheet, twenty advance sheets, see whether you can find such a case. The late and distinguished Canadian torts scholar Cecil Wright estimated that the factual causation issue might come up in one case in a thousand.⁴ In an earlier era (and still in areas of this country where tort law remains underdeveloped), the chameleon phrase "proximate cause" or its only slightly improved successor "legal cause" appeared as an issue in a significantly larger number of cases. But the issue in those cases is usually not factual causation or connection at all, but rather the policy problem of whether it is wise to impose liability on the defendant as sought by the plaintiff—the legal "duty" issue.

Yet, notwithstanding its comparative rarity in torts litigation, the physical causation "who done it" issue has provided fascination for an elite band of torts scholars. Professors Hart and Honoré of England,⁵ Harari of Australia,⁶ and in this country Professors Leon Green,⁷ Robert Keeton,⁸ Wayne Thode,⁹ Clarence Morris,¹⁰ and, of course, Becht and Miller¹¹ have all had their go at the subject. The attraction may lie in the fact that while factual causation or connection is simplicity itself in the great bulk of cases, there are borderline situations (more often encountered on law school examinations than in the real world) that challenge and puzzle the intellectual processes.

I. SOME VEXING CAUSATION CASES

An innocent victim is shot by one of two hunters and it is not possible to determine which hunter's shot hit the victim.¹² A somewhat similar case is the surgical patient injured by the malpractice of one of the

4. Wright, *The Law of Torts: 1923-1947*, 26 CAN. B. REV. 46, 58 (1948).

5. H. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959).

6. A. HARARI, *THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS* (1962).

7. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962), reprinted in L. GREEN, *THE LITIGATION PROCESS IN TORT LAW* 249 (2d ed. 1977).

8. R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963).

9. Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1; Thode, *supra* note 3.

10. Morris, *On the Teaching of Legal Cause*, 39 COLUM. L. REV. 1087 (1939).

11. A. BECHT & F. MILLER, *supra* note 1.

12. The leading multiple hunters-single victim case is *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948).

surgical team, but each member of the team individually denies responsibility, and there is no evidence to enable sorting out the individual wrongdoer.¹³ These cases begin as true “who done it” cases—characterized by an innocent victim with multiple defendants—but break down with discovery that there is no possibility of identifying the one wrongdoer among the several defendants.

Another class of cases comprises those situations where the defendant’s wrongdoing is one of the factors or forces in a sequence leading to the plaintiff’s injury. But in these cases, the plaintiff might have suffered the injury anyway—from the other factors or forces at work—even if the particular defendant’s wrongdoing is dropped out of the story. Illustrative are the multiple fires cases, where defendant’s fire combines with other fires of nontortious or natural origin to burn the plaintiff’s property, when any one of the fires might have inflicted all of the damages in the absence of any one of the other fires.¹⁴ Then there is the malpractice case where the victim is already injured. With careful treatment a cure might have been effected, but on the other hand the forces of nature might have prevented a cure.¹⁵ The case of the overboard seaman with the captain who fails to turn back to conduct a search is a similar problem.¹⁶ The seaman drowns from natural forces and thus might have drowned even if the captain had carefully searched for him. Cases where the defendant cuts off the water used to fight a fire may be seen as similar. The building might have burned to the ground anyway, but we can never know.

In some ways these multiple causes (or “what did it”) cases are similar to the “who done it” cases. But there is a difference. In the former, the plaintiff can identify the defendant as a wrongdoer, but the issue is whether the happenstance of the operation of other factors or causes, which alone might have brought about the same result, should relieve the defendant from liability.

Still another class of cases is comprised of situations where the defendant was negligent, where his conduct brought the injury to the

13. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), is the leading case presenting this problem.

14. *See, e.g., Anderson v. Minneapolis, St. P. & S.S.M. Ry.*, 146 Minn. 430, 179 N.W. 45 (1920).

15. *See, e.g., Kuhn v. Banker*, 133 Ohio St. 304, 13 N.E.2d 242 (1938) (plaintiff denied recovery on the “loss of chance” theory for a physician’s malpractice in setting a hip because even careful orthopedic procedures have a significant failure rate).

16. *See, e.g., Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir. 1962) (liability imposed for failure to search for an overboard seaman).

plaintiff, but it may be plausibly argued that the negligent aspect of the defendant's conduct played no part in the injury and hence the "negligence" of the defendant was not a cause of the plaintiff's injury. Thus, an infant darts into the path of a drunken driver when even a skilled driver could not have avoided hitting the child. That the drunken driver hit the child is indisputable, and in that sense his conduct caused the injury,¹⁷ but did his negligent driving "cause" the injury—and should that be required in such a case?

Becht and Miller were fascinated by these cases. They seem to regard them as cases to be analyzed in terms of physical causation distinct from policy or evaluative questions of whether it would be desirable to impose or deny liability in the particular case.

II. THE BECHT AND MILLER ANALYSIS

The *Restatement of Torts* treats the multiple fires problem as an exception to the general rule that the defendant's conduct must have been an "essential," "but for," or, as Becht and Miller put it, a "necessary cause." To impose liability in the multiple fires cases, the *Restatement* provides a special exception which imposes liability in the "two force" situation where each of the forces alone would have been able to bring about the full measure of the plaintiff's damage.¹⁸ Protesting what they regard as an unprincipled and inadequate exception to a defective general rule requiring that the defendant's conduct in general be a neces-

17. See Thode, *supra* note 3, at 430-31.

In such a case would the supreme court hold as a matter of law that the plaintiff had lost on cause in fact because he failed to produce any evidence that the same thing would not have happened absent defendant's negligent conduct? My judgment is that the court would strive mightily to uphold a jury finding of cause in fact. Why? Basically I think it is because the public policy against drunken, high-speed driving in residential areas is so strong and the risk of injury to children so great that the court would decide that the defendant should have the potential for liability even though plaintiff is unable to produce evidence that a sober man, driving carefully, would not have caused the same injury. This kind of argument cannot logically be made by the court under the cause in fact issue, hence the straitjacket. It can, and should, be made by the court in determining whether the risks created by the negligent defendant's conduct are within the scope of his duty to plaintiff.

Id. But cf. RESTATEMENT (SECOND) OF TORTS § 432 (1965) ("the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent").

18. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.")

sary or “but for” cause, Becht and Miller reject the *Restatement* approach:

[I]f “necessary” cause is to be the fundamental conception with which the law works, some way of delineating it must be found that will separate it from “causes” in general. The *Restatement’s* conception is so broad that it resolves many doubts against a finding of causation. Even if “necessary cause” were found the most useful conception for legal purposes, it would not follow that this particular conception of it is best. Finally, the draftsmen of the *Restatement* recognized a class of exceptions to their conception in Section 432(2); the exact determination of the exception, of course, also is hard, for one must choose what situations to except and then find words to describe them clearly.¹⁹

Becht and Miller approach the two fires case by testing factual causation with the question whether the same thing would have happened had the conduct of the defendant been taken out of the picture. Then on the ground that the fire that reached the defendant’s property while there was still something to burn was a cause of the result of the pattern of destruction, they assert that in the two, three, or four fires situation the defendant’s one fire should be recognized as a cause or one of the causes of destruction.²⁰

There is, of course, a natural inclination to inquire why one would consider this atomistic approach to causation superior to the lump sum result of the “but for” approach. Plainly either approach is possible—for causation in the courthouse is simply one of the questions to be answered en route to a decision in a torts case imposing or denying liability. Becht and Miller rarely address the question of why their approach is preferable beyond indicating occasionally that they prefer the imposition of liability that follows emancipation from a “necessary cause” or “but for” test of causation.²¹ But to the extent that a preference for a particular approach to the causation issues is based on the resulting liability, policy considerations are at work, whether revealed or not.

Their treatment of negligent failure, or omission, as a “cause” of in-

19. A. BECHT & F. MILLER, *supra* note 1, at 19 (footnote omitted).

20. *Id.* at 18.

21. Becht and Miller’s approval of liability in the multiple fires situation seems to be implicit. Their approval of the imposition of liability in the two hunters situation, however, is explicit: “Our own conclusion is that it is better to compensate the plaintiff than to protect the innocent defendant, at least as long as the plaintiff can show that both defendants were negligent.” *Id.* at 105. “The basis of the liability, we believe, is the fairness of making both liable because both have participated in the wrong.” *Id.* at 114.

jurious consequences dramatizes this point. In these cases they prescribe construction of a "parallel series" replicating the sequence of facts while omitting the omission, or more accurately, substituting due care on the part of the defendant to ascertain "hypothetical cause."²² Thus, in the case of the inattentive or drunken driver who struck the darting child, they would consider what would have happened (the hypothetical case) had the driver exercised due care. They concede that under their atomistic approach the results of the impact probably would not have been precisely the same if the driver had been exercising due care—the point of impact on both the car and the child would have been slightly different. But here they prefer to ask whether the plaintiff would have suffered substantially the same damages and, if so, they conclude the defendant's negligence is not a cause in fact.²³ Becht and Miller explain this deviation from the atomistic approach by asserting that the finding of no causation is preferable because it accords with the layman's notion of causation. Further, they assert it is difficult to administer a more precise atomistic comparison of what did happen with what would have happened had the defendant acted with care.²⁴ One may agree or disagree with the causation approach offered by Becht and Miller, but surely they demonstrate that choosing between alternative causation formulations is not dictated by science or logic but rather by weighing the relevant policy factors in each case.

Factual causation theory generally reaches results that seem sensible and accord with what the courts do in fact. But there are some aberrations. The authors note the case of the inattentive motorist who collides with an oncoming vehicle whose driver fails to signal and then turns into the path of the inattentive motorist.²⁵ Plainly this is a case where both parties were negligent and contributed to the crash. Under a modern comparative negligence statute,²⁶ presumably both would have claims against the other subject to reduction of damages for contributory negligence. The Becht and Miller analysis, however, posits a "parallel series" with prudent conduct replacing each actor's negligent conduct:

The failure to signal is not a cause of the harm, because, tracing hypothet-

22. *Id.* at 21-33.

23. *Id.* at 28-29.

24. *Id.*

25. *Id.* at 88.

26. *See, e.g.*, KAN. STAT. § 60-258a (1974); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1975); PA. STAT. ANN. tit 17, § 2101 (Purdon 1977).

ically from the omission, one can see that a signal would not have avoided the accident. This problem involves the odd circumstance that the contributory negligence is also not a cause of the harm, as, tracing hypothetically from the omission, there would have been no signal to see if the plaintiff had looked. The plaintiff loses because he cannot prove a causal relation between the defendant's negligence and the harm, not because his own negligence was a hypothetical cause of the harm.²⁷

Their conclusion that neither actor's negligence caused the collision is not only astonishing—it flies in the face of common sense. They recognize as much in later passages when they consider the claim of an innocent passenger in such a case and conclude that “the negligence of neither of them [the two negligent drivers], tracing hypothetically, was a cause of [the injury to the passenger].”²⁸ But the horrendous prospect of denying the claim of the innocent and careful passenger on that ground is too much for Becht and Miller. Accordingly, they would impose liability by mainstrength, by dispensing with the requirement that the defendant have been a cause of the injury to the plaintiff²⁹—an almost equally astonishing solution.

In this two negligent drivers case surely good sense tells us that the negligence of both figured in the result. Both are causally chargeable. Why isn't the atomistic approach Becht and Miller offer on other types of multiple cause cases, such as the two or three fire case, usable on this multiple cause problem? In the two negligent drivers case, if one of the drivers had been careful, the nature of the resulting collision would surely have been somewhat different, ergo causation could be found! In this setting we surely should and can detach ourselves from the “substantial equivalence of injury” approach of their “omission cases” for policy reasons—when it seems so clear the cause of justice is thereby better served. So again on a pesky problem of causation, the really troublesome cause question seems ultimately a question to be resolved by reference to policy or evaluative considerations.

Cases where it is plain that only one force brought harm to the plaintiff, but where the evidence is insufficient to establish which of several actors delivered the harmful contact, also present problems for Becht and Miller. They would, at least in many such cases, impose joint and several liability on all the suspects. The class of suspects would include all those involved in the sequence that brought harm to the plaintiff

27. A. BECHT & F. MILLER, *supra* note 1, at 88 (footnote omitted).

28. *Id.* at 95.

29. *Id.*

and who cannot prove themselves free of responsibility. The shooting incident where several hunters fire and one hits the plaintiff is such a case. Similar in some respects is the malpractice case where the plaintiff cannot identify the member of the surgical team who made the injurious mistake. In such cases to insist that the plaintiff identify with particularity the defendant to be charged means a judgment for all defendants. Conventional notions of burden of proof and of the necessity for individual causation call for that result. Some courts, however, are not satisfied to relieve all defendants when only one of the group could have produced the harmful result. Instead, there are a number of cases—which Becht and Miller as a matter of policy applaud—which impose joint and several liability on all the suspects.³⁰ Their solution again is draconian—to dispense with any requirement of causation. Thus, in the hunters case they conclude that “it is better to compensate the plaintiff than to protect the innocent defendant, at least as long as the plaintiff can show that both defendants were negligent . . . if the defendants are held, the only possible theory is that the burden of proof should be relaxed.”³¹ Then in a later passage, “[t]he basis of the liability, we believe, is the fairness of making both liable because both have participated in the wrong.”³²

They are more cautious in the malpractice case, but indicate no sense of outrage at imposing liability on all the suspects (even though only one was a wrongdoer). They observe that these problems “are best dealt with as what in fact they are—doubtful questions of causation,”³³ and proceed to endorse the position of Professor Malone that in such cases policy or evaluative considerations should be determinative.³⁴ To insist on proof that the particular defendant was a cause of the plaintiff’s harm is a dead end, rejected because considerations of justice cry out for a different result—joint liability on all suspects based on their participation in, or connection with, the events that led to the plaintiff’s injury. It is not a matter of burden of proof, but rather is one of having a special rule of liability—a “duty” rule—to cover such cases. Where it is impossible to identify the individual whose negligent act injured the plaintiff, the duty imposed on the defendant is to refrain

30. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), remains the leading case on multiple defendant malpractice. For a more recent case applying the doctrine, see *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (1975).

31. A. BECHT & F. MILLER, *supra* note 1, at 105.

32. *Id.* at 114.

33. *Id.* at 120.

34. See Malone, *supra* note 3, at 73.

from participation in any action harmful to the plaintiff. In such a case, when a plaintiff sustains injury the duty is breached, and, in a collective responsibility sense, the breach (participation in action) has caused the plaintiff's injury. Becht and Miller do not dispense with the causation requirement, but instead recognize that the group must have caused the harm. Accordingly, they adopt a liability rule—a duty rule—imposing joint liability on participants when individual responsibility cannot be apportioned. They are correct in viewing this rule as different from both vicarious liability and conventional joint liability for joint torts,³⁵ but imposition of liability does not dispense with the requirement of a showing of some connection between the acts of the defendant and the plaintiff's injury. The plaintiff must show a connection or causal relation stemming from the particular defendant's involvement or participation. A substantive rule of joint liability in such cases substitutes for conventional individual causation a kind of collective causation, required in the interests of justice.

III. BASIC PROPOSITIONS

In their conclusion to their own theories of causation, Becht and Miller comment:

[T]he reasoning on which it [their causation analysis] rests is made out of two elements: First, a distinction between questions of fact and questions of value, and second, assumptions about causation which the law must make if its reasoning on this subject is to correspond with common sense ideas of the events of ordinary life. The rather surprising complications which follow from these elements arise, so far as we can observe our own mental processes, from the application of them to actual or very plausible cases. When this application begins, two distinctions follow: First, the distinction between acts and omissions, which in its turn produces two notions of causation. Second, it becomes necessary to separate the negligent segment of the conduct from the conduct as a whole. To complete the application of the theory, it seems to us, the wiser choice is to "equate" injuries in some omissions cases and in certain kinds of act cases in order to avoid conclusions which strictly follow from our premises but which it seems improbable that laymen or lawyers would readily adopt. The process of "equating" is kept as accurate in detail as possible, so that it is subject to logical control. The product is a separation of the three issues, causation, damages, and limitation of liability, which is necessary not only to obtain sound results in particular cases but also in order to rest those re-

35. A. BECHT & F. MILLER, *supra* note 1, at 118-19.

sults upon sound reasons which will not be misleading when applied in later cases.

We have found no reasoning which would avoid the complications, except by converting the fact questions to value questions whenever they become difficult. To a person who does not accept this distinction this conversion would be unobjectionable, but accepting the distinction, and believing in it as we do, we cannot take that way out. We have tried to face the consequences frankly, and still prefer them, complicated as they are, to a dangerous confusion of two different kinds of questions and three different issues.³⁶

Their exercise in striving diligently to separate policy considerations from the factual issue of causation is persistent but in the end unconvincing—for reasons adverted to in this very passage. As long as the causation question relates to common experience, to the experience of the jury, it is sensible to describe it as a factual question. In this context the term “fact” is used to describe issues appropriate for the jury, the experts on common experience. The “what happened” question and the “but for” test of causation speak to common experience and are thus functionally appropriate for jury submission. But when the occurrence is unusual, and the “but for” test is not satisfied in a situation where the defendant’s conduct nevertheless figured in the injury to the plaintiff, there is no storehouse of experience relevant to the question whether the defendant is blameworthy as a “cause” of the injury. The matter then ceases to be an issue of what happened and becomes a question of the legal consequence courts should attach in this hard and rare case.

In short, the hard causation questions are the questions whether the defendant’s connection with the results is sufficiently concrete to make him chargeable even though common experience might not implicate him as a cause of the injury. When Becht and Miller declined to accept that “fact questions [on causation are converted] to value questions whenever they become difficult,” they rejected the approach functionally appropriate to the distinction between what happened and what should be done about it.³⁷ For the difficulty in all hard cases is generally not what happened, but rather whether liability should attach.

We should not be too hard on them seventeen years after publication of their book. Their instincts about how to resolve the problems when evaluative or policy factors are allowed to operate were sound indeed.

36. *Id.* at 151-52.

37. *Id.* at 152.

It was only their insistence on their own special language to which one can take exception. I continue to doubt, as I doubted fourteen years ago,³⁸ the viability of a set of new terminology to analyze the relatively rare difficult causation problems. The Becht-Miller language has not caught on in the interim and it seems unlikely that it will.

From the comments offered to this point it is clear that I am enthusiastically in disagreement with some of what Becht and Miller said in their book on the theoretical framework for processing causation issues. I do, however, agree with them that it is wise to separate, so far as possible, the factual "what happened" question from the legal question of what responsibility should attach. I also remain enthusiastic about their having chosen to till this rather obscure part of the garden of tort law. Today, as in 1961, no one can read Becht and Miller without being stimulated, without being provoked to reconsider elemental concepts related to causation.

IV. ONWARD

The case of the drunken or speeding driver who runs down a child darting into the path of his car, under circumstances where even a careful driver could not have avoided the accident, poses the question whether causation requires a nexus between the negligent conduct and the injury. Should we say that the negligence of the driver was not a cause of the injury to the child in such a case? If we adhere to the facts as given and accept the idea that the exercise of due care would not have avoided the impact, then both the *Restatement*³⁹ and Becht and Miller⁴⁰ would find that there is no causal relation between the defendant's negligence and the plaintiff's injury.

38. But I would be less than honest if I did not express real skepticism concerning the value of the special terminology offered as essential parts of the [Becht and Miller] methodology.

Concededly there are difficulties in proving causal relation in some cases and those difficulties may commonly be greater in the "omission" cases. That does not, in my view, warrant the invention of a special set of terminology. If we react against the functional separation of "acts" and "omission," we react as well against their analogues "simple" and "hypothetical causes." I do not find these verbal tools helpful in sharpening my analysis of troublesome causation questions. As a language technique of a relatively private nature, I would be concerned that students drilled in the use of this terminology might be disposed to assume they could talk this language with others not so fortunately schooled. There is a risk that students so drilled would be best fitted to practice on and before each other and, I think, at no net gain even if that were possible.

Pedrick, *supra* note 2, at 856.

39. See RESTATEMENT (SECOND) OF TORTS § 432 (1965) (excerpted in note 17 *supra*).

40. A. BECHT & F. MILLER, *supra* note 1, at 28.

There is another possibility espoused by Professors Thode⁴¹ and Green.⁴² They would limit the causation inquiry to the question whether the defendant's *driving* was a cause of the plaintiff's injury and thus easily reach an affirmative conclusion that the driver was factually a cause of the plaintiff's injury.⁴³ They would treat the question of the weight to be given the fact that even with the exercise of due care plaintiff would have suffered substantially the same injury as creating an issue for the judge, *i.e.*, whether the particular harm suffered should be covered by the duty to drive with care.⁴⁴

Professor Thode, in commenting on this kind of case, argues that courts better serve the policy of discouraging speeding and drunken driving by imposing liability, and that it serves the cause of justice to empower the judge to find that plaintiff's injury was within the scope of defendant's duty not to speed or drive while intoxicated.⁴⁵ He finds some case support for his thesis that linking the defendant's conduct to the plaintiff's injury should satisfy the causal relation requirement,⁴⁶ but concedes that in the real world a jury is likely to find a causal relation even if instructed that the defendant's negligence must have been a necessary cause, *i.e.*, that plaintiff would not have sustained the injury if defendant had exercised due care.⁴⁷ He further concedes that an appellate court—to advance the policy objective—would strain to uphold a jury finding of causal relation.⁴⁸

It is probably not possible nor always sensible, regardless of how we

41. See Thode, *supra* note 3. Professor Thode includes Professors Seavey and Keeton together with Professor Green and himself as advocates for strictly limiting the causation determination to the factual issue. Thode concedes, however, that under a "legal cause" approach he and Professor Green would pass to the jury on a "legal cause" instruction the policy question of whether to impose or deny liability in the case where the negligent aspect of the defendant's conduct was not itself an active causal factor. *Id.* at 428-29. But see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 237 & n.6 (4th ed. 1971) (approving the use of defendant's conduct to show a causal connection as distinguished from requiring that the negligence be a cause).

42. Green, *supra* note 7.

43. *Id.* at 550-52; Thode, *supra* note 3, at 430-31.

44. Green, *supra* note 7, at 553-56; Thode, *supra* note 3, at 431.

45. See note 17 *supra*.

46. See Thode, *supra* note 3, at 435 n.40 (citing *Page v. St. Louis S.W. Ry.*, 459 F.2d 820 (5th Cir. 1965); *Dewey v. Klaveness & Co.*, 233 Ore. 515, 379 P.2d 560 (1963); *Stoneburner v. Greyhound Corp.*, 232 Ore. 567, 375 P.2d 812 (1962) (Goodwin, J., concurring)).

But in light of the RESTATEMENT (SECOND) OF TORTS § 432 (1) (1965), which asserts that causation depends on linking the negligence of the defendant with the injury to the plaintiff, this debate is not likely to be resolved in the foreseeable future. The cases squarely presenting the issue do not, as has been noted, often arise. See text accompanying notes 6-10 *supra*.

47. Thode, *supra* note 3, at 430.

48. See note 17 *supra*.

frame the rules of causation, to wholly separate questions of physical causation from questions of policy and policy implementation. Accordingly, I agree with Professor Thode that in the real world the case of the darting child and the drunken, speeding driver is likely to result in liability. In a debate with a leading personal injury lawyer on the merits of no-fault auto insurance, I categorized this case as one where the law of negligence would impose no liability because of lack of causal connection between the defendant's negligence and the child's injury. The practitioner's response was simple and effective: "Just let me try that case and I'll get you a plaintiff's verdict."

Whether the liability question should be decided on a causation (fact) or a duty (law) level is in itself a policy question. Perhaps the point here is that the policy question has to be answered—on a policy level. The Green-Thode thesis allowing the judge to decide the issue on policy grounds has considerable appeal. But the law is probably *contra* in most states. Confidence in the jury's inclination to give some weight to policy when finding facts is some basis for relying on the "negligence as a necessary cause" approach. An instruction phrased in terms of a "substantial factor" may give the jury an adequate fudge factor—offensive, of course, to purists.

The situation where conduct or an omission of the defendant is one of a complex of factors resulting in injury to the plaintiff is also problematic. The plaintiff contracts cancer. Radiation, which the defendant negligently administered, entered into the combination of factors that led to the disease. Absent the radiation, plaintiff might still have contracted cancer. How should courts handle this culpable alteration of the laws of chance? A logical computation of the actuarial price on the changing of the odds, yielding only a fraction of the damage suffered for loss of some chance to be cancer-free, will have small appeal to the cancer-ridden plaintiff. But the economist may be troubled by charging the defendant the full price for cancer only partially to be laid at the defendant's door, if that.

The House of Lords in 1972 dealt with this issue in *McGhee v. National Coal Board*.⁴⁹ A brickworks employee contracted dermatitis and claimed that the negligent failure of the employer to install showers (to facilitate the removal of brick dust) materially increased his risk of contracting the disease. Defendant conceded that his failure to provide showers violated his duty of due care, but argued that the plaintiff

49. [1972] 3 All E.R. 1008 (M. of L.).

might have contracted dermatitis anyway. Medical evidence indicated that while the absence of shower facilities increased the risk, it was uncertain whether their absence caused the plaintiff to contract the disease. In short, placing a burden on the plaintiff to prove that "but for" the absence of showers the employee would not have contracted dermatitis would have meant judgment for the defendant. The House of Lords took the view, however, in this multiple-factor situation, that a negligent increase in the risk and the subsequent contraction of the disease was a sufficient causal connection. In justifying the result, the following observations of the Law Lords are of interest. Lord Reid concluded his opinion with the comment that

the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to the injury.⁵⁰

Lord Wilberforce observed that

it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause The employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default.⁵¹

And Lord Simon noted that "[i]n this type of case a stark distinction between breach of duty and causation is unreal To hold otherwise [and relieve the defendant of liability] would mean that the respondents were under a legal duty which they could, in the present state of medical knowledge, with impunity ignore."⁵² Professor Weinrib offers an insightful analysis—with which I am in full accord—of *McGhee's* significance.⁵³

The difficult cases arise when the application of the "but for" test does not establish factual causation By its very existence as a device of inclusion it tempts us into thinking that it can also be applied to exclude On the contrary, it may be best to acknowledge that we can come no closer to an adequate solution of the cause in fact problem than to con-

50. *Id.* at 1011.

51. *Id.* at 1012-13.

52. *Id.* at 1014-15.

53. Weinrib, *supra* note 3.

front it directly by asking simply whether the defendant's conduct was a substantial factor in producing the injury.⁵⁴

To that I would add, as does Professor Weinrib in another passage, that while causation may be seen as a purely factual issue in the easy cases, in the difficult cases "we must always be prepared to test the cause in fact process against the underlying policies and purposes that it embodies, and to adjust the ordinary method of dealing with cause in fact if it fails adequately to reflect our more basic notions of fairness."⁵⁵

In short, the separation between facts and policy is easy and useful in the simple causation cases when the "but for" test is easily satisfied, but in the difficult cases where strict application of the test produces undesirable release from liability, recourse must be had to policy considerations. Modification of the nature of the required causal nexus to better serve the ends of justice is a likely result.

Becht and Miller probably would not quarrel with that conclusion. Indeed, they are quick to support departure from orthodoxy in the causation requirement when they feel considerations of fairness and justice so dictate. One may even doubt whether, were they writing today, they would endeavor to sustain so pure a separation between issues of factual causation and the policy problems inherent in the liability question.

In his comment on the *McGhee* decision, Professor Weinrib concludes with the observation that "[n]o case on cause in fact can aspire for inclusion in the galaxy of momentous tort decisions of the august style. In this area the soil is too dry to sustain great structures."⁵⁶ It is probably fair to offer the same assessment of jurisprudential writing on cause in fact in tort cases. Because of the scarcity of cases raising the problems, interest in the subject is at something less than fever pitch. The rewards for writing in the field must be largely the pleasures of scholarship unaccompanied by popular or even academic acclaim. Since the study of factual causation by Becht and Miller is one of Professor Becht's major works, an outsider can only speculate on the motivation that led him to undertake this very considerable job of independent and creative analysis.

I hazard the guess that Professor Becht must be an academic who was troubled by the dearth of scholarship in a field of some importance and considerable intellectual challenge. Once immersed in the subject,

54. *Id.* at 522.

55. *Id.* at 530.

56. *Id.* at 534.

the only escape was in the therapy of writing and publishing the book. As he and his collaborator Professor Frank Miller put it in their introduction: "The chief purpose of this analysis is to help clarify and simplify reasoning for all the hard cases, whether or not it leads to definite conclusions about the correctness of existing rules."⁵⁷ That was a large order but they have offered their prescription. What a stimulating book it is! How splendidly it will serve a seminar in tort theory or jurisprudence! No lawyer, no teacher, no student can read Becht and Miller with any care without being moved to critical, painstaking evaluation of their several theories. No matter that many of us are not enthused about the private language they offer for use in discussion of causation questions. No matter that many of us reject their thesis that it is almost always possible and desirable to separate facts and policy considerations on the hard problems of causation. What does matter is that Arno Becht laid it on the line, was willing to do a demanding job of analytical thinking and offer it for critical examination by successive generations of law teachers and law students. He has helped sharpen our tools. Not many of us have done as much.

For your troubling, stimulating, sometimes mystery-making propositions on factual causation, Professor Becht, we stand in your debt. One can only hope that the resource you have put in our hands will be more fully used.

57. A. BECHT & F. MILLER, *supra* note 1, at 1.